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No. 14-6368

IN THE

Supreme Court of the United States

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

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OPINION AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Western District of Wisconsin, is reported at 744 F.3d 443 and is reprinted in the Joint Appendix (J.A.) at J.A. 288–331. The court of appeals' order denying the petition for rehearing en banc is unreported and reprinted at J.A. 334–35. The judgment of the district court is unpublished and is reproduced at J.A. 287.

JURISDICTION

The court of appeals entered judgment on March 3, 2014, J.A. 332–33, and denied Mr. Kingsley's petition for rehearing en banc on April 18, 2014, J.A. 334–35. On July 2, 2014, this Court granted a timely filed application (No. 14A11) to extend the time to file a petition for a writ of certiorari until August 18, 2014. The petition was timely filed on August 18, 2014. This Court granted the petition on January 16, 2015, and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The statutory provision involved is 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

INTRODUCTION

This case involves a pretrial detainee's excessive force claim under 42 U.S.C. § 1983. Petitioner Michael Kingsley argued that the respondent jail officers used objectively unreasonable force when they tased him as he lay facedown on a concrete bunk, handcuffed behind his back, and surrounded by four jail officers, one of whom had his knee on Mr. Kingsley's back. Under the district court's instructions to the jury, later approved by the Seventh Circuit, that objective showing would be insufficient to state an excessive force claim under § 1983. Instead, the court held that, under the test applicable to claims of excessive force against pretrial detainees, Mr. Kingsley would also need to prove subjective elements: that the officers applied force "recklessly," "recklessly dis-

regarded [his] safety," and "acted with reckless disregard of [his] rights." J.A. 278.

The district court's jury instructions were incorrect. A pretrial detainee, who has not been convicted of any crime, may prove a constitutional violation by showing that state actors used objectively unreasonable force. And, although the first step in analyzing a plaintiff's excessive force claim is identifying the particular constitutional right involved, the outcome here is the same whether the Court chooses to proceed under the Due Process Clause or the Fourth Amendment. The objective unreasonableness standard applies to claims under the Due Process Clause, which protects pretrial detainees (like other individuals) against deprivations of liberty that result from the arbitrary use of government force. It also applies to pretrial detainees' claims that state officers have violated the Fourth Amendment's protections against unreasonable physical seizures. Whichever constitutional provision is applied to Mr. Kingsley's claim, the Seventh Circuit erred in approving the jury instructions, and the case should be remanded for a new trial.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Michael Kingsley was arrested and booked into the Monroe County Jail in Sparta, Wisconsin on April 21, 2010. J.A. 42, 289. He was being detained pending trial at the time of the incident that gave rise to his excessive force claim.[1]

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[1] Specifically, by the time of the incident on May 21, 2010, Mr. Kingsley had appeared at a bond hearing, as well as an initial appearance under Wis. Stat. § 970.01. Court Record Events, *State* v. *Kingsley*, Monroe Cnty. Case No. 2010CF000134, Wis.

In the late evening of May 20, 2010, and again in the early morning of May 21, 2010, jail officers ordered Mr. Kingsley to remove a piece of paper that was affixed to the light in his cell. J.A. 126–28.[2] Mr. Kingsley told the officers that he had not put the paper there, and refused to remove it. J.A. 42–43.

The officers decided to transfer Mr. Kingsley to a "receiving" cell so that jail staff could remove the paper. J.A. 44. Defendants, Sergeant Stan Hendrickson and Deputy Fritz Degner (respondents here), and three other officers participated in the transfer. *Id.* To accomplish it, the officers first entered Mr. Kingsley's cell and handcuffed him behind his back while he was lying face down on his bunk. *Id.* Mr. Kingsley testified that the handcuffs were extremely tight. J.A. 131. During the transfer, the officers banged Mr. Kingsley's leg against the bunk in picking him up, causing pain in his foot and making it difficult for him to walk. *Id.* The officers then carried Mr. Kingsley from the original cell to the receiving cell. Although Mr. Kingsley did not walk of his own volition, he did not threaten or actively resist the officers—rather, he groaned and complained that he could not

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Ct. System Cir. Ct. Access, http://wcca.wicourts.gov/courtRecordEvents.xsl;jsessionid=7A2D5D6D02D8EBE639C94767A8D8A88D.render6?caseNo=2010CF000134&countyNo=41 (last visited Mar. 1, 2015). He had not had a complete preliminary examination under Wis. Stat. § 970.03 (a preliminary examination had commenced on May 13, 2010, but had been continued to June 11 before testimony was complete), and had not yet been arraigned pursuant to Wis. Stat. § 971.05. *Id.*

[2] As Mr. Kingsley later testified, jail inmates often put a piece of paper over the cell light, and the paper in his cell was already there when he was transferred to that cell about a month earlier. J.A. 127–29. As the court below noted, inmates cover the light with paper to dim the brightness of the light. J.A. 289–90.

walk. J.A. 291. Portions of the transfer were captured on video. J.A. 45.

In the receiving cell, Mr. Kingsley was placed face down on a cement bunk with his hands still cuffed behind his back. *Id.* The jail officers surrounded Mr. Kingsley, blocking the view of the cell's only camera, and Sergeant Hendrickson placed his knee on Mr. Kingsley's back. J.A. 132–33. The officers tried to remove the handcuffs, but had difficulty doing so. J.A. 45–46. The parties dispute whether Mr. Kingsley was resisting removal of the handcuffs by tensing his arms. J.A. 291–92.

Sergeant Hendrickson, who still had his knee on Mr. Kingsley's back, directed Deputy Degner to "tase" Mr. Kingsley, ostensibly to permit the officers to remove the handcuffs. J.A. 292. Deputy Degner tased Mr. Kingsley on his upper back for five seconds, resulting in extreme pain. *Id.* Afterwards, the officers left the cell, leaving Mr. Kingsley alone on the bunk while still handcuffed. J.A. 46. Other officers were later able to remove Mr. Kingsley's handcuffs without incident. *Id.*

B. Proceedings Below

Mr. Kingsley filed suit pro se pursuant to 42 U.S.C. § 1983, alleging, among other things, that Sergeant Hendrickson and Deputy Degner used excessive force during the incident. J.A. 292. The officers filed a motion for summary judgment, which the district court denied as regards Mr. Kingsley's excessive force claim based on the events in the receiving cell. J.A. 41. Specifically, after viewing a video of the events in the receiving cell, the district court noted that it was "not clear . . . whether plaintiff was resisting or struggling. [He did] not appear to be moving his body around aggressively or very much at all." J.A. 45.

The court ruled there was a genuine issue of material fact whether the officers' use of force was disproportionate to the situation. J.A. 50–51.

The court also concluded that the officers were not entitled to qualified immunity. Applying the Eighth Amendment standard for excessive-force claims, it found that "[t]he notion that unnecessary and wanton infliction of pain constitutes cruel and unusual punishment" was not a new legal principle. The court further observed that pretrial detainees are entitled to "at least as much protection from excessive force" as convicted prisoners. J.A. 49, 53–54. Following the denial of the officers' motion for summary judgment, the district court appointed pro bono counsel to represent Mr. Kingsley at trial. J.A. 16, 294.

At the trial, both parties presented experts on the use of force. Mr. Kingsley presented the testimony of an expert witness, Brian Landers, a veteran police officer, academy instructor, and a member of the Wisconsin Department of Justice Tactical Advisory Committee on Defense and Arrest Tactics. J.A. 145–48. Mr. Landers opined that, under the totality of the circumstances, the use of the taser did not comport with professional standards and was unreasonable because Mr. Kingsley did not exhibit active resistance during the incident. J.A. 156, 164–65. Mr. Landers also stated his opinion that the officers had not properly handcuffed Mr. Kingsley, which may have led to their difficulty in removing the handcuffs. J.A. 165–66.

At the final pretrial conference, Mr. Kingsley requested that the court use the Seventh Circuit's pattern jury instruction relating to excessive force claims. J.A. 76–77. The defendant guards requested an instruction for excessive force claims under the Eighth Amendment. J.A. 65. The trial court, over

both parties' objections, proposed its own instruction. J.A. 113–15. At the jury instruction conference, Mr. Kingsley renewed his objection to the district court's proposed instruction, pointing out that it required a showing that the guards used force with a specified subjective intent, which was at odds with the Seventh Circuit's pattern instruction for § 1983 excessive force claims. J.A. 229–30. Mr. Kingsley stated that the standard for excessive force claims brought by pretrial detainees should track the Fourth Amendment and require only a showing that the use of force was objectively unreasonable under the circumstances. *Id.* Mr. Kingsley further argued that the district court's proposed instruction would confuse the jury. J.A. 229, 231.

Over Mr. Kingsley's objection, the district court deviated from the pattern jury instructions and required Mr. Kingsley to show that defendants applied force "recklessly," "recklessly disregarded plaintiff's safety," and acted with "reckless disregard of plaintiff's rights." J.A. 233, 277–78. With these phrases placed in context, the jury instructions were as follows:

> Excessive force means force *applied recklessly* that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;
>
> (2) Defendants' use of force was unreasonable in light of the facts and circumstances of the time;
>
> (3) Defendants knew that using force presented a risk of harm to plaintiff, but they *reck-*

lessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with *reckless disregard of plaintiff's rights*, you may consider factors such as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
- Any efforts made by defendants to limit the amount of force used.

J.A. 277–78 (emphases added).

Following these instructions and deliberations, the jury found for the defendants. The district court entered judgment, and Mr. Kingsley timely appealed.

On appeal to the Seventh Circuit, Mr. Kingsley again argued that under prevailing case law, the ap-

plicable standard for an excessive force claim brought by a pretrial detainee is whether the challenged conduct is an objectively unreasonable use of force in the circumstances. Appellant's Br. 11–16. Mr. Kingsley further argued that to the extent a showing of intent is required, that requirement is met where the conduct is deliberate, as opposed to merely negligent. Appellant's Br. 13. Finally, Mr. Kingsley argued that the jury instructions as given were likely to have confused the jury and prejudiced him at trial. Appellant's Br. 8, 14, 18, 22.

On March 3, 2014, a divided panel of the Seventh Circuit affirmed. The majority applied the Due Process Clause of the Fourteenth Amendment in evaluating Mr. Kingsley's excessive force claim because it found that a pretrial detainee is neither an arrestee (protected from unreasonable seizure by the Fourth Amendment) nor a sentenced prisoner (protected from cruel and unusual punishment by the Eighth Amendment). Rather, it concluded that a pretrial detainee is entitled to an intermediate level of protection. J.A. 297. Notably, the panel first highlighted that the controlling case in the Circuit held that "the propriety of using force on a person in custody pending trial will track the Fourth Amendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them." J.A. 301. But the panel nonetheless concluded that the test is not wholly objective.[3] It as-

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[3] In their brief in the court of appeals, respondents asserted that they were entitled to qualified immunity. Appellees' Br. 28–29. Mr. Kingsley argued in response that respondents waived this argument in the district court and that, in any event, it was incorrect because an officer would not have qualified immunity if he used *objectively unreasonable* force under the circumstances. Reply Br. 8–10. The court of appeals did not

serted that the Circuit's prior cases "make clear that, although we employ the objective criteria of the Fourth Amendment as a touchstone by which to measure the gravity of the defendant officer's conduct, we also recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind in performing the activity under scrutiny" when examining a claim arising under the Fourteenth Amendment. J.A. 303, 307.

Judge Hamilton dissented. He criticized the panel majority for introducing a new, additional element into the claim and effectively allowing officers an escape hatch, even when they use objectively unreasonable force. J.A. 311–12 (asking "[w]hen does the Constitution allow law enforcement and correctional officers to use *objectively unreasonable* force against a person not convicted of a crime?" (emphasis added)). In the dissent's view, "[i]f a pretrial detainee can prove that a correctional officer used objectively unreasonable force against him, it should be self-evident that the detainee was 'punished' without due process of law." J.A. 311. The dissent also stated that the district court's insertion of recklessness into the instruction added a "vague and confusing extra hurdle for the plaintiff." J.A. 319. Instead, the dissent asserted, Mr. Kingsley should have been given a new trial with the Circuit's current pattern jury instructions that do not require jurors to find that an officer acted with a specific subjective intent. J.A. 326.

The Seventh Circuit denied Mr. Kingsley's timely petition for rehearing en banc. J.A. 334–35.

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address the parties' qualified immunity dispute. Respondents mentioned qualified immunity only in passing during the *certiorari* stage, in a footnote. *See* Br. Opp'n 17 n.1.

SUMMARY OF THE ARGUMENT

The issue in this case is whether government officials may intentionally use objectively unreasonable force against a pretrial detainee with impunity, at least so long as they do not act with malice or recklessness or some other bad mental state. The court of appeals below held that—no matter how arbitrary and unreasonable a use of force may be—a detainee cannot establish a violation of his constitutional rights without proving that an officer "had the requisite state of mind." J.A. 303. This Court's precedents impose no such requirement. This Court requires that a plaintiff pursuing an excessive force claim under the Constitution first "identify[] the specific constitutional right allegedly infringed." *Graham* v. *Connor*, 490 U.S. 386, 394 (1989). However, whether viewed through the lens of the Due Process Clause or of the Fourth Amendment, a pretrial detainee's constitutional protection from unjustified physical intrusion does not turn on an officer's private thoughts.

The Due Process Clause of the Fourteenth Amendment protects individuals against the arbitrary exercise of government power. As this Court explained in *County of Sacramento* v. *Lewis*, for example, due process prohibits an executive official's "exercise of power without any reasonable justification in the service of a legitimate governmental objective." 523 U.S. 833, 846 (1998). Nothing in this Court's due process jurisprudence suggests that an officer's subjective motivations can excuse objectively unreasonable physical violence. Nor does a pretrial detainee lose the protections of the Due Process Clause upon booking. See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979) (noting that pretrial detainees retain their due process rights).

This Court's decision in *Bell* set forth a standard for evaluating due process challenges to a pretrial detainee's conditions of confinement, and it provides an appropriate basis for analyzing excessive force claims as well. *Bell* held that a deprivation of liberty with the "expressed intent to punish" a pretrial detainee violates due process, 441 U.S. at 538; but a pretrial detainee can also demonstrate a due process violation by proving that the state's use of force against him was "excessive in relation to," or not "reasonably related to," a legitimate government interest. *Id.* at 538–39. In other words, a detainee can prevail by showing *either* (a) improper motivation to punish *or* (b) an objectively unjustified deprivation. The latter standard requires no inquiry into the officer's state of mind.

The balancing of interests that is central to the due process analysis, as exemplified in *Bell*, is precisely the same approach that the Court has developed in its "excessive force" cases under the Fourth Amendment. And, in fact, the Court has held that the Fourth Amendment "must be the guide for analyzing" claims that officers have used "excessive force" in the course of a "'seizure' of a free citizen" because it "provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct." *Graham*, 490 U.S. at 395. Following *Graham*, the Fourth Amendment establishes the standard governing the state's use of force against pretrial detainees.

This Court could reasonably hold that Fourth Amendment protections extend to a pretrial detainee on the theory that he or she is subject to a "continuing seizure"—but there is no need to go that far in this case. At the very least, the Fourth Amendment's protections apply when an official's actions against a

detainee are so physically intrusive as to constitute a new "seizure," separate and apart from the existing lawful detainment. Any such seizure is evaluated under the objective unreasonableness standard of the Fourth Amendment. See *Graham*, 490 U.S. at 396. And the test for reasonableness is an objective one, requiring "careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985)).

Regardless of whether this Court evaluates excessive force claims brought by pretrial detainees under the Due Process Clause or under the Fourth Amendment, the fundamental rule is the same: the Constitution bars the application of force that is excessive when balanced against a legitimate government interest. Pretrial detainees need only make an objective showing to meet that standard, which neither invites nor requires an inquiry into the private thoughts of the government actor.

ARGUMENT

The jury instructions at Mr. Kingsley's trial erroneously required him to affirmatively prove a particular subjective element—recklessness—to prevail on his excessive force claim. That requirement is inconsistent with this Court's approach to similar constitutional claims.

The Court has explained that the first step in addressing a claim of excessive force is "identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham* v. *Connor*, 490 U.S. 386, 394 (1989) (citing *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979)). This Court has expressly left open the question whether pretrial detainees' ex-

cessive force claims are governed by the Due Process Clause or the Fourth Amendment. See *Graham*, 490 U.S. at 395 n.10. However, under either Amendment, a pretrial detainee demonstrates that the state has used excessive force in violation of the Constitution if he shows that the use of force was deliberate (rather than negligent) and was objectively unreasonable under the circumstances. He is not required to prove that the officer acted with a particular subjective motivation such as malice or recklessness.

As demonstrated in Part I, the use of an objective reasonableness test to determine whether a pretrial detainee has been deprived of liberty without due process of law follows naturally from this Court's existing approach to claims arising from the treatment of pretrial detainees, embodied in *Bell* v. *Wolfish*, 441 U.S. 520, 535–39 (1979). And, as shown in Part II, an objective reasonableness test also applies if such claims are properly brought under the Fourth Amendment, which is the more particularized constitutional right governing the "seizure" here.[4] Accordingly, the jury instructions below were incorrect no matter which Amendment is applied to Mr. Kingsley's claim, and the case should be remanded for a new trial.

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[4] This case presents no Eighth Amendment question. That Amendment's prohibition against cruel and unusual punishment is triggered only by conviction of a crime. *See Graham*, 490 U.S. at 398 ("the less protective Eighth Amendment standard applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'") (quoting *Ingraham* v. *Wright*, 430 U.S. 651, 671 n.40 (1977)). Accordingly, it does not apply to pretrial detainees, who have not yet been convicted of any crime.

I. A STATE ACTOR'S DELIBERATE USE OF OBJECTIVELY UNREASONABLE FORCE AGAINST A PRETRIAL DETAINEE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Graham*, this Court noted that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." 490 U.S. at 395 n.10 (citing *Bell*, 441 U.S. at 535–39). But a threshold question is whether the right to freedom from punishment constitutes the *full extent* of the due process right that pretrial detainees possess in all circumstances while in jail or whether pretrial detainees have more robust due process protections in some settings. *Bell* was, after all, a case about conditions of confinement, not about excessive force; and this Court has not determined that the Due Process Clause applies in this excessive force setting, let alone its standard or test.[5] In fact, *Bell* itself recognized that the protections of due process may extend beyond the narrow context of "punishment" of pretri-

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[5] For example, some courts of appeals have found that when a state officer deliberately uses physical force wholly disproportionate to or unreasonable in light of any legitimate need or purpose of the state, that action violates the Due Process Clause. *See, e.g.*, *Robles* v. *Prince George's Cnty.*, 302 F.3d 262, 269–70 (4th Cir. 2002) (police officers violated due process by handcuffing a detainee to a metal pole in a deserted mall parking lot, leaving him unattended at night for 10 to 15 minutes, without any legitimate state purpose); *see also Estate of Booker* v. *Gomez*, 745 F.3d 405, 424 (10th Cir. 2014) (violation of due process where force used against detainee, including a taser and a carotid neckhold, was "not proportional to the need presented."); *Jones* v. *Wellham*, 104 F.3d 620, 628 (4th Cir. 1997) (violation of due process where police officer raped plaintiff); *Gray* v. *Spillman*, 925 F.2d 90, 93 (4th Cir. 1991) (beating and threatening plaintiff if he would not confess violates due process).

al detainees. See, *e.g.*, 441 U.S. at 536–37 (noting that conditions of pretrial detention are lawful "so long as those conditions and restrictions do not amount to punishment, or *otherwise violate the Constitution.*" (emphasis added)).

However, this Court need not decide here whether the proper standard is one that recognizes greater protection for pretrial detainees than the *Bell* freedom-from-punishment test. As shown below, that test prohibits state officers from deliberately using objectively unreasonable force against pretrial detainees. Moreover, if the Court were to decide not to use the *Bell* test in cases involving pretrial detainees' claims of excessive force, it should apply a Fourth Amendment standard to the new "seizure" that occurs when force is used against such detainees, see Part II below.

A. The Due Process Clause Prohibits Arbitrary, Objectively Unreasonable, Deliberate Acts Of Official State Violence, Including Against Pretrial Detainees.

This Court has "emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government.'" *Cnty. of Sacramento* v. *Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974)); see also *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (the Due Process Clause "was 'intended to secure the individual from the arbitrary exercise of the powers of government'" (quoting *Hurtado* v. *California*, 110 U.S. 516, 527 (1884))). When the acts of executive officials are at issue, the Due Process Clause prohibits "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Lewis*, 523 U.S. at 846.

The concerns regarding arbitrary and unreasonable executive action that animate the Due Process Clause are implicated most strongly when intentional acts of violence and restraint by government officials are at issue. See, *e.g.*, *Youngberg* v. *Romeo*, 457 U.S. 307, 316 (1982) ("'Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" (alteration omitted) (quoting *Greenholtz* v. *Neb. Penal Inmates*, 442 U.S. 1, 18 (1979))); *Ingraham* v. *Wright*, 430 U.S. 651, 673–74 (1977) ("While the contours of this historic liberty interest . . . have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment."). This Court has long recognized that to permit officials to commit violence "unjustifiable by any government interest," *Lewis*, 523 U.S. at 849, would be "to afford brutality the cloak of law." *Rochin* v. *California*, 342 U.S. 165, 173 (1952).

This protection from arbitrary and unjustified acts of violence extends to individuals who have been detained but who have not been convicted of any crime. See *Graham*, 490 U.S. at 395 n.10. *Bell* held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." 441 U.S. at 535. As this Court later explained, the *Bell* Court "weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty" and determined that "detainees, not yet convicted of the crime charged, could not be punished." *Youngberg*, 457 U.S. at 320. Thus, *Bell* stands for the proposition that punishment of pretrial detainees is not, by itself, a "legitimate governmental objective." *Bell*, 441 U.S. at 539. See also *id.* ("[I]f restriction or condition is not reasonably related to a legitimate

goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.").

Bell was focused on due process protections relating to the conditions of pretrial confinement, see 441 U.S. at 535-39, but it nevertheless provides a useful starting point for adjudicating excessive force claims brought by pretrial detainees. "It is clear" from *Bell* that, at the very least, "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, 490 U.S. at 395 n.10 (citing *Bell*, 441 U.S. at 535–39). And *Bell*'s test for determining when the conditions of confinement for pretrial detainees violate the Due Process Clause may also be applied in cases involving state officers' use of excessive-force against those detainees.

In *Bell*, this court analyzed "particular restrictions and conditions" under the Due Process Clause without requiring a showing of an expressed intent to punish:

> Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination [whether the detainee's due process right has been violated] generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment."

441 U.S. at 538 (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). Thus, while a pretrial detainee can show that a "particular restriction[] or condition[]" violates the Due Process Clause by demonstrating that the relevant state officer had an "expressed intent to punish," he can also show a constitutional violation by demonstrating that the officer's deliberate action was not "reasonably related to a legitimate governmental objective." In the latter circumstances, a violation of due process can be established without regard to the officer's mental state. *Id.* at 538–39.

B. Under *Bell*, A Plaintiff May Prove A Due Process Claim With Purely Objective Evidence.

As explained above, an intentional use of physical force that constitutes an arbitrary and unreasonable executive action violates a person's due process rights. This standard may be satisfied with purely objective evidence of the government official's deliberate conduct in the relevant circumstances. In other words, the plaintiff need not prove that the officer had a particular mental state such as malice or recklessness.

In the particular case of a pretrial detainee's excessive force claim, the language of *Bell*, supported by this Court's due process jurisprudence, demonstrates that a plaintiff may prevail with a purely objective showing that the use of force amounts to punishment under the circumstances. If jail officials had no "expressed intent to punish," a pretrial detainee can show that the use of force is not "rationally [] connected to" a legitimate government purpose, or that the force was "excessive in relation to" its stated purpose. *Bell*, 441 U.S. at 538 (quoting *Mendoza-*

Martinez, 372 U.S. at 168–69 (alterations in original)). Each of the latter two showings is objective.

1. *Bell* Creates An Objective Test For Determining "Legitimate" State Goals.

As noted, in *Bell*, this Court explained that the Due Process Clause prevents the state from imposing restrictions on a pretrial detainee "not reasonably related to a legitimate goal." 441 U.S. at 539. *Bell* made clear that the question whether a professed government interest is legitimate is to be answered objectively. The *Bell* Court listed several legitimate purposes for restrictions on pretrial detainees, including "ensuring a detainee's presence at trial" and "manag[ing] the facility in which the individual is detained." *Id.* at 540. The Court did not "attempt to detail the precise extent" of permissible government interests. *Id.* Instead, its analysis made clear that whether a proffered purpose is "legitimate" does not turn on the subjective motivation of the officers. See *id.* (describing particular purposes that may justify restrictions and deprivations—such as the need to "make certain no weapons or illicit drugs reach detainees"—rather than officials' subjective beliefs that government interests legitimately included such goals).

Substantive due process cases in other settings have elaborated on the objective nature of this inquiry. For example, in *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), a case involving a high speed police chase, this Court observed that "conduct intended to injure in some way unjustifiable by any government interest" is the type of action "that would most probably support a substantive due process claim." *Id.* at 849. But the Court has never suggest-

ed that an act must be not only deliberate,[6] but also taken *in bad faith or recklessly*, to be a deprivation of liberty actionable under the Due Process Clause. Instead, the Court has recognized that due process claims are analyzed by "weigh[ing] the individual's interest in liberty against the State's asserted reasons for restraining individual liberty." *Youngberg*, 457 U.S. at 320. This balancing inquiry allows for the possibility that an official acting in subjective good faith may violate an individual's due process rights if the action does not further any legitimate government purposes.

Following this Court's lead, courts should apply *Bell*'s objective analysis of the legitimacy of a state's purpose to due process claims generally. For instance, in *Robles* v. *Prince George's County*, 302 F.3d 262 (4th Cir. 2002), police officers, tasked with transferring a pretrial detainee into custody of a neighboring jurisdiction, instead handcuffed the detainee to a metal pole and left him unattended at night in a deserted parking lot until the other officers arrived 10 or 15 minutes later. Judge Wilkinson explained that these objective facts showed the officers' actions to be

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[6] The protections of the Due Process Clause do not extend to *negligent* acts—a requirement this Court has found inherent in the term "deprivation." *Daniels*, 474 U.S. at 331. "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Id.* For this reason, a pretrial detainee must show that the use of force was more than merely negligent. For example, in this case, as the dissent below noted, if the defendants' "application of force was not intentional"—if, hypothetically, "the taser went off by accident"—"then there would have been no constitutional violation." *See* J.A. 323. However, respondents have never argued that respondent Degner's use of the taser against Mr. Kingsley, or respondent Hendrickson's instruction that Degner do so, was unintentional.

"entirely unrelated" to any legitimate state purpose. *Id.* at 269. The officers' subjective motivations—whether malicious or "merely immature"—were irrelevant: "Even a so-called prank that fails to serve any 'legitimate governmental objective' can constitute a due process infraction." *Id.* at 269–70 (quoting *Bell*, 441 U.S. at 539).

The use of an objective "legitimate purpose" test is particularly appropriate in light of the substantial deference to government officials already built into the *Bell* test. As when a legislative action is challenged on rational basis grounds, see, *e.g.*, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 442–43 (1985), courts considering executive actions show significant respect to state officials' characterizations of state interests and explanations of how particular actions further those purposes. Indeed, *Bell* itself recognized that the "professional expertise" of corrections officials will cause courts to give great weight to their testimony about proper state interests in jail operations. 441 U.S. at 540 n.23 (quoting *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974)). But when considering either legislative or executive action, if a court finds that the officer's asserted purpose is not a legitimate one, then the officer's good faith will not save him or her from liability.

2. *Bell* Creates An Objective Test For Whether Government Action Is "Reasonably Related" To A Permissible Goal Or "Excessive" In Relation To That Goal.

In determining whether a particular restriction on pretrial detainees is constitutional, *Bell* also stated that a restriction on detainees violates due process if it is not "rationally . . . connected" to the proposed purpose, or "whether it appears excessive in relation

to" that purpose. 441 U.S. at 538 (quoting *Mendoza-Martinez*, 372 U.S. at 168–69). Simply put, the Court considers whether a restriction is "reasonably related" to the proffered legitimate purpose. *Id.* at 539. This inquiry, like that into the legitimacy of a government purpose, is objective, as an examination of *Bell*'s analysis reveals.

For example, *Bell* notes that the Due Process Clause prohibits especially harsh practices that promote security or other legitimate objectives—such as "loading a detainee with chains and shackles and throwing him in a dungeon"—if the state's objectives can be attained through "many alternative and less harsh methods." 441 U.S. at 539 n.20. The comparison between the harshness of the state's practice and its alternatives is an inherently objective analysis, based on facts such as the precise restraints placed on the detainee and the available alternatives. *Bell* did not suggest that, in addition to examining these objective circumstances, a state officer's subjective motives are relevant to "excessiveness."

Similarly, in applying its standard to the specific restrictions before it, the Court found the practice of "double-bunking" at the Metropolitan Correctional Center in Manhattan to be permissible, without considering jail officials' subjective beliefs about the need for the policy. *Id.* at 541–43. Instead, the Court examined the circumstances such as the size of detainees' rooms and available amenities before concluding that the policy was reasonably related to the legitimate purpose of holding detainees for trial. *Id.*; see also *id.* at 561. The nature of the Court's analysis thus strongly suggests that state officers' subjective motivations for their actions are irrelevant to whether government treatment of detainees is "rationally

related" to its stated purpose or "excessive" in light of that purpose.

In other cases in which the asserted rights are based on the Due Process Clause, this Court has made clear that the "rationally related" and "excessiveness" tests are objective. See, *e.g.*, *Youngberg*, 457 U.S. at 316; *Ingraham*, 430 U.S. at 673–74. In *Youngberg*, for instance, this Court held that a state institution may not restrain a resident with an intellectual disability "except when and to the extent professional judgment deems this necessary" for safety purposes or to provide rehabilitative training. 457 U.S. at 324. In determining whether a particular restraint was reasonably related to these permissible purposes, the Court acknowledged the need for deference to professionals, but noted that a due process violation might occur if an official "actually did not base the decision" on "accepted professional judgment"—an objective standard. *Id.* at 323.

3. Under *Bell*'s Objective Test, An Objectively Unreasonable Use Of Force Against A Pretrial Detainee Violates The Due Process Clause.

Because, as shown above, the substantive due process test for analysis of a pretrial detainee's excessive force claim is an objective one, the well-developed and familiar Fourth Amendment formulation of objective "reasonableness" can be used.

Under *Bell*'s framework, cases will often turn on whether the state officers' use of force was excessive in relation to enforcement of jail security, including ensuring the safety of jail personnel, the detainee, and other inmates. Specifically, fact-finders will be asked to weigh the threat posed by detainees against the injury to the inmate that results from the force

actually used. See *Bell*, 441 U.S. at 539 n.20 (emphasizing a comparison between the restrictions actually imposed and the "alternative and less harsh methods" available).

This analysis dovetails with that required under the Fourth Amendment standard, which "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985)). Specific considerations in the Fourth Amendment context are the strength of the security interest, which include "whether the suspect poses an immediate threat to the safety of the officers or others" and "whether he is actively resisting." *Id.*; see also *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2021–22 (2014) (analyzing "grave public safety risk" posed by suspect). Against this interest is weighed the suspect's interest in bodily integrity, measured by the "extent of the intrusion" caused by the officer's use of force. *Garner*, 471 U.S. at 7–8; see also *Scott* v. *Harris*, 550 U.S. 372, 384 (2007) (weighing "the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing" a fleeing suspect). These are the same factors at issue in a due process excessive force case. A use of force that is not "necessary in a particular situation" under a Fourth Amendment test, *Graham*, 490 U.S. at 397, also is not "reasonably related" to security interests under the approach set forth in *Bell*.

The parallels between excessive force claims under the Due Process Clause and the Fourth Amendment also illustrate that an "objectively unreasonable" standard for pretrial detainees' claims will not have a deleterious effect on jail operations. Whether a jail

officer's use of force in a given situation is objectively reasonable will depend critically on the "facts and circumstances" at hand, in addition to the nature of the force itself. *Id.* at 396. The Fourth Amendment's objective standard is based on facts known at the time, not hindsight; it makes "allowance for the fact that police officers are often forced to make split-second judgments" in "tense, uncertain, and rapidly evolving" situations. *Id.* at 397.

Moreover, an "objectively unreasonable" standard has the advantage that it is already familiar to and utilized by many jails for the treatment of pretrial detainees. Jail officials are frequently trained not to use objectively unreasonable force in any situation. In Mr. Kingsley's case, for instance, the jail officers were guided by the *Principles of Subject Control* ("POSC"), a manual for jail and detention officers in Wisconsin produced by the Wisconsin Department of Justice. J.A. 242, see also J.A. 168; J.A. 218. The POSC manual instructs jail officers that "[y]ou may not know the custody status of the inmate with whom you are dealing, nor are you expected to use force differently depending on the custody status of an inmate. For these reasons, the training standard used in POSC is . . . the Fourth Amendment 'objective reasonableness' standard." J.A. 247–48.[7]

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[7] Officers in other jails are similarly trained to use only a reasonable amount of force. *See, e.g.*, Cook County Sheriff, Sheriff's Office Order No. 11.2.1.0, *Response to Resistance/Use of Force Policy* 1 (2011), *available at* http://www.csd700.com/uploads/1/6/8/9/16896754/general_orders__aug_13.pdf ("Officers shall use an amount of force reasonable and necessary based on the totality of the circumstances to perform a lawful task, effect an arrest, overcome resistance, control a subject, or protect the officer(s) or others from injury . . . .").

Of course, there are unique risks in a correctional environment, such as the presence of other inmates and the possibility of escapes, and therefore certain situations that arise in a jail setting may present legitimate reasons to use force. But when, taking all relevant facts into account and assessing the situation from the point of view of a reasonable officer in the circumstances, a jury nonetheless concludes that the state officers' use of force against a pretrial detainee was objectively unreasonable, there is no basis for a test that provides additional deference.[8]

II. THE FOURTH AMENDMENT FORBIDS STATE OFFICERS TO USE OBJECTIVELY UNREASONABLE FORCE AGAINST A PRETRIAL DETAINEE.

In *Graham*, this Court held that the Fourth Amendment's objective reasonableness standard governs claims based on the use of excessive force during arrest, but reserved "the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive force beyond the point at which the arrest ends and pretrial detention begins." 490 U.S. at 395 n.10. In this section, we show that the Fourth Amendment provides pretrial detainees with "protection against

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[8] In contrast, this Court's Eighth Amendment case law routinely requires that a state officer act with a particular intent such as malice in order to violate that Amendment's prohibition of cruel and unusual punishment. The Eighth Amendment applies only after a person has received the procedural protections guaranteed by the Due Process Clause, and it is "[t]he prisoner's conviction" which "entitles the State to classify him as a 'criminal,'" to prevent him from interacting with others in free society, and otherwise to punish him. *Ingraham*, 430 U.S. at 669 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972)).

the deliberate use of excessive force" throughout the period of pretrial detention.

A. The Guards' Use Of Force Against Mr. Kingsley Was A New Seizure.

"*[A]ll* claims that law enforcement officers have used excessive force—deadly or not—*in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen* should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395 (second emphasis added). The Court determined that the Fourth Amendment "must be the guide for analyzing" such claims because it "provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct." *Id.*

This Court has also made clear that the Fourth Amendment continues to govern certain aspects of state officials' conduct with respect to a pretrial detainee even after an arrest has been completed. For example, *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), holds that "the Fourth Amendment requires a [prompt] judicial determination of probable cause as a prerequisite to extended restraint of liberty following [a warrantless] arrest." *Id.* at 114. See also *Cnty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 53 (1991) (describing *Gerstein*'s Fourth Amendment holding as presumptively requiring a hearing within 48 hours, a "'practical compromise' between the rights of individuals and the realities of law enforcement." (citation omitted)). On the other hand, as described in detail above, this Court has also applied the Due Process Clause in assessing the constitutionality of other aspects of the state's conduct towards pretrial detainees. See *Bell*, 441 U.S. at 520 (double-bunking and body-cavity searches following contact visits, *inter*

alia, do not deprive pretrial detainees of liberty under the Due Process Clause). For the reasons set forth below, this Court should hold that the Fourth Amendment establishes the standard governing the state's use of force against pretrial detainees.

Preliminarily, an individual who has not been convicted of any crime but who is detained by the state pending trial is subject to a continuing seizure and, as a result, the state's conduct toward such an individual should be evaluated for objective reasonableness under the Fourth Amendment. See *Albright* v. *Oliver*, 510 U.S. 266, 278–79 (1994) (Ginsburg, J., concurring) (noting that at common law "an arrested person's seizure was deemed to continue even after release from official custody" and that a person remains "'seized' for trial, so long as he is bound to appear in court and answer the state's charges"); *id.* at 307 (Stevens, J., dissenting) (agreeing with Justice Ginsburg's "explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable").[9] But this Court need not go so far as to hold that all pretrial detentions are continuing seizures. Instead, state officials' actions against a detainee that are "physically intrusive" such that they constitute a new seizure—that is, a seizure different from, or in addition to, the existing lawful detainment—are governed by the Fourth Amendment standard. Based on this Court's established definition of a "seizure," see *infra* p. 30, the use of objectively unreasonable force against a pretrial detainee will virtually always constitute such a new seizure within the meaning of the Fourth Amendment.

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[9] This Court has never specified the end-point of the Fourth Amendment seizure that begins with a person's arrest. *See infra* note 10.

This Court has "long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person." *California* v. *Hodari D.*, 499 U.S. 621, 624 (1991). "A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *Graham*, 490 U.S. at 395 n.10 (quoting *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968)); see also *Terry*, 392 U.S. at 16 (a seizure ends when the restraint on the individual's "freedom to walk away" no longer exists); *Garner*, 471 U.S. at 7 ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person."); *Brower* v. *Cnty. of Inyo*, 489 U.S. 593, 597 (1989) (seizure occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*"); *id.* at 596 ("Violation of the Fourth Amendment requires an intentional acquisition of physical control."). Pretrial detainees retain a liberty interest because they have not been convicted of any crime, see *Bell*, 441 U.S. at 545, and thus they can be "seized" within the meaning of the Fourth Amendment even when they have been lawfully detained.

A person may be lawfully detained even if arrested without a warrant so long as he or she receives a prompt judicial determination of probable cause.[10]

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[10] At the time the state used objectively unreasonable force against Mr. Kingsley, he had appeared at a bond hearing and an initial appearance but had not yet been arraigned or concluded his probable cause hearing. *See supra* note 1. It is clear that individuals who have been arrested and who are being held without a judicial determination that they are lawfully confined are entitled to Fourth Amendment protections under this Court's decisions in *Graham*, 490 U.S. at 386; *Gerstein*, 420 U.S.

And after that probable-cause determination, a person may be lawfully detained until trial. See *Gerstein*, 420 U.S. at 114. As noted, this continuing seizure of a pretrial detainee prior to conviction for any crimes supports application of the Fourth Amendment to state officers' use of unreasonable force against that detainee. See *supra* pp. 28–29. But, even assuming that the initial seizure of a person *ends*, either when the arrest is made or the judicial determination of probable cause occurs, a state officer's deliberate use of force against a lawfully detained person awaiting trial is a new "seizure" under the Fourth Amendment. That new seizure of a person lawfully in custody, but not convicted of any crime, is governed by the objective reasonableness standard of the Fourth Amendment.

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at 103; and *McLaughlin*, 500 U.S. at 44. *See supra* pp. 28–29. Indeed, the Ninth Circuit has explicitly extended the Fourth Amendment's protections against excessive force to "prolonged warrantless, post-arrest, pre-arraignment custody." *Pierce* v. *Multnomah Cnty.*, 76 F.3d 1032, 1043 (9th Cir. 1996) ("We hold, therefore, that the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest."); *see also* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. Pa. L. Rev. 1009, 1041–45, 1061–66 (2013) (noting that the temporal scope of the Fourth Amendment has not been clearly defined and arguing that the Fourth Amendment should apply to conditions-of-confinement and excessive-force claims by arrestees until a probable cause determination or until arraignment). The end point for application of the Fourth Amendment standard to excessive force claims after arrest is unresolved. However, if this Court agrees that uses of objectively unreasonable force against pretrial detainees constitute new seizures and thus should be analyzed under the Fourth Amendment, this distinction among arrestees and pretrial detainees makes no legal difference in excessive force claims.

Mr. Kingsley's case provides a good illustration of this point. He had appeared before a judicial officer at the time of the incident; thus, he was being lawfully detained and awaiting trial. Put differently, the initial seizure of his person was arguably complete. Then, after he declined to remove a piece of paper from the light in his cell, he was subject to new physical restraints within his cell, by guards who held his arms, followed by handcuffing and then by tasing. See *supra* pp. 3–5. This physical intrusion and restraint is wholly distinct from the "seizure" that constituted Mr. Kingsley's warrantless arrest and detention pending arraignment and it therefore constitutes a new "seizure" within the meaning of the Fourth Amendment, to which the objective reasonableness test should apply.

There is nothing anomalous about concluding that Mr. Kingsley was subject to a seizure while already lawfully detained and incarcerated (*i.e.*, already seized). For example, this Court has previously distinguished routine incarceration from custody for purposes of an interrogation requiring *Miranda* warnings. In *Maryland* v. *Shatzer*, 559 U.S. 98, 108–09 (2010), this Court found that a prisoner's return to the general prison population after invoking his right to counsel constituted a break in *Miranda* custody for purposes of custodial interrogation. See also *Howes* v. *Fields*, 132 S. Ct. 1181, 1190–91 (2012) (service of a prison term is not enough to constitute *Miranda* custody). Here, the fact that Mr. Kingsley had been seized when arrested did not preclude him from being subjected to a second physical intrusion or seizure when the guards used force against him in the receiving cell.

As noted above, this Court has already applied the Fourth Amendment to state conduct with respect to

pretrial detainees *who have not yet been arraigned* by requiring a prompt probable-cause inquiry after a warrantless arrest. See *supra* p. 28–29 (discussing *Gerstein* and *Riverside*). And the Court has applied the Due Process Clause to pretrial detainees' conditions of confinement presumably *after those detainees had been arraigned* and received a probable-cause determination. See *supra* pp. 17–19 (discussing *Bell*). However, it is illogical to draw the line between application to pretrial detainees of the Fourth Amendment, on the one hand, and the Due Process Clause, on the other, at the probable-cause hearing or arraignment. That inquiry focuses on justification for a warrantless arrest. The existence of probable cause for an arrest renders a person's continued detention lawful. Thus, it may mark the end of the initial seizure of that person and have some effect on this Court's assessment of the constitutionality of his conditions of confinement, as it did in *Bell*. But the existence of probable cause for arrest is *not* relevant to assessment of the appropriate conduct for a state officer during his or her physical interactions with detainees who have not yet been convicted of any crime. Whenever a deliberate seizure of a person not yet convicted of a crime occurs, it should be governed by the Fourth Amendment.

Applying the Fourth Amendment to all seizures of pretrial detainees has the additional virtue of limiting the scope of the substantive Due Process Clause in assessing the constitutionality of the conduct of state actors. In *Albright*, this Court reinforced its "reluctan[ce] to expand the concept of substantive due process, because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." 510 U.S. at 271–72 (quoting *Collins* v. *Harker Heights*, 503 U.S. 115, 125 (1992)).

There is no need to expand substantive due process to state officers' deliberate use of force against pretrial detainees when the Fourth Amendment standards are so well known and offer the perfect balance of the important interests at stake.

Finally, the Fourth Amendment test proposed here is in accord with the Court's statement in *Graham* that in most instances, the constitutional right implicated in an excessive force case will either be the Fourth Amendment or the Eighth Amendment. *Graham,* 490 U.S. at 394. A pretrial detainee's status is much closer to that of an arrestee than a convicted prisoner, in that only in the case of the convicted prisoner have the procedural protections of the Fifth and Fourteenth Amendments been afforded as prerequisite to the imposition of criminal punishment. Thus, the Fourth Amendment, and its objective standard, is the proper framework for analysis of excessive force claims of pretrial detainees. In contrast, the Eighth Amendment, which, among other things, takes into account the subjective intent of the officer, is an inappropriate framework.

B. The Fourth Amendment's Test Appropriately Balances The Important Individual And State Interests At Stake.

As discussed above, applying an objective reasonableness standard to claims that state officers have used excessive force against pretrial detainees will appropriately balance the relevant constitutional interests at stake. The Fourth Amendment's objective reasonableness test with respect to the use of force has been fully developed by this Court in the context of state officers' use of force *to make an arrest.* There, this Court has explained that the reasonableness of the officers' application of force is context and fact specific. *Graham*, 490 U.S. at 396 (citing *Garner*, 471

U.S. at 8–9 (question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure")). Moreover, "[t]he 'reasonableness'" inquiry in an excessive force case is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 390 U.S. at 396 (citing *Terry*, 392 U.S. at 20–22):

> With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," . . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Graham, 390 U.S. at 396–97 (quoting *Johnson* v. *Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). Notably, "an officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Graham*, 390 U.S. at 397 (citing *Scott* v. *United States*, 436 U.S. 128, 138 (1978)).

Just as state officers have the right to use reasonable force or physical coercion or the threat of either to effectuate a lawful warrantless arrest, they also have the right to use such force to maintain order and safety in a detention facility. Critically, however, in both circumstances, state officials are dealing with persons not yet convicted of any crime. That is, the state has not yet "'complied with the constitutional guarantees traditionally associated with criminal

prosecutions,'" when it uses force against either a person lawfully subject to warrantless arrest or a person lawfully subject to pretrial detention. See *Graham*, 390 U.S. at 398 (quoting *Ingraham*, 430 U.S. at 671 n.40). In both settings, the objective reasonableness test provides state officers with substantial leeway since all actions are viewed through the lens of a reasonable officer under all the circumstances presented and second-guessing and hindsight are forbidden. This test represents the appropriate balance of the interests at stake when the state uses force against an individual not convicted of a crime. See also *Garner*, 471 U.S. at 8–9.[11]

In sum, the established Fourth Amendment test of objective reasonableness should apply when a pretrial detainee is subjected to a new seizure in the form of objectively unreasonable physical force while being confined and awaiting trial.

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[11] As explained above, this test will not undermine jail security or other legitimate state interests in prison or jail administration. And it is both familiar and administrable, as its long use demonstrates. *See supra* pp. 26–27.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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